

STATE OF MICHIGAN
COURT OF APPEALS

MISS DIG SYSTEM, INC.,

Petitioner-Appellant,

v

CITY OF AUBURN HILLS,

Respondent-Appellee.

UNPUBLISHED

May 10, 2012

No. 303059

Michigan Tax Tribunal

LC No. 00-350051

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

Petitioner Miss Dig, Inc., appeals as of right the Michigan Tax Tribunal's order requiring petitioner to pay taxes on its real and personal property for tax years 2008, 2009, and 2010 to respondent City of Auburn Hills. We affirm.

I. BACKGROUND

Petitioner is a nonprofit organization. Petitioner operates a one call center that receives calls from anyone who plans to commence underground excavation within the State of Michigan. The one call center runs 24 hours a day, seven days a week, and has a toll free number. When someone calls petitioner's call center, petitioner takes the pertinent excavation information from the caller free of charge. Petitioner then transmits the excavation information to its paying utility members and participants. Once the utility members and participants receive the excavation information from petitioner, it is their responsibility to go out and mark the location of their underground facilities before the planned excavation occurs.

Around 2006, petitioner move its headquarters to a building located in Auburn Hills. Thereafter, Auburn Hills assessed ad valorem taxes on petitioner's real and personal property. Petitioner disputed the tax assessment, claiming that it was exempt from ad valorem taxation because it was a charitable institution pursuant to MCL 211.7o. The Auburn Hills review board

denied petitioner's reassessment request and petitioner timely appealed to the Michigan Tax Tribunal regarding tax years 2008, 2009, and 2010.¹

After a bench trial, the tax tribunal determined that petitioner was not exempt from ad valorem taxation pursuant to MCL 211.7o. The tax tribunal concluded that:

Nothing before the Tribunal, be it documentary evidence or testimony, leads the Tribunal to the conclusion that Petitioner was organized chiefly if not solely as a charity. The Tribunal believes that the record is clear that Petitioner was formed as a result of the legislative mandate contained in Act 53 of 1974 that required certain utilities to form an association to operate a one-call system as a condition to being able to operate as utilities in the State of Michigan. Although the effect of the one-call system may be of benefit to the general public, that benefit does not constitute a gift to an indefinite number of individuals and does not "... erect or maintain public buildings or works; or otherwise lessen the burden of the government." It is therefore not a charitable institution within the meaning of MCL 211.7o and not exempt from ad valorem taxation.

From this ruling, petitioner now appeals as of right.

II. ANALYSIS

"Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle." *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). "[T]he tribunal's factual findings [are] conclusive if they are supported by 'competent, material, and substantial evidence on the whole record.'" *Id.*, citing Const 1963, art 6, § 28. Substantial evidence is more than a scintilla, but may be substantially less than a preponderance. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). We review the statutory interpretation of the tribunal's decision de novo. *Wexford*, 474 Mich at 202.

Petitioner argues that the substantial evidence does not support the tax tribunal's finding that it is not a charitable institution because petitioner is a legislative creation, codified in Public Act 53 of 1974, MCL 460.701 *et seq.*, which is principally for the benefit of its members. This act is entitled "protection of underground facilities" and it requires the public utilities to form an association that will facilitate proper notification to the underground facility owners before underground excavation commences:

(1) *Public utilities having underground facilities shall form and operate an association providing for mutual receipt of notification of construction activities in those areas served by public utilities having underground facilities. Notification to the association formed and operated by the public utilities shall be*

¹ Petitioner also sought tax exempt status as an educational institution, MCL 211.7n, but the tax tribunal dismissed that claim and petitioner has not appealed that determination.

considered to be notice to each public utility having underground facilities within the proposed areas of excavation, discharging of explosives, tunneling, demolition, drilling, or boring. Notification to the association shall be effected in writing as set forth in section 5 or by telephone call, providing the same information required by section 5, made by the person or public agency responsible for the excavating, demolishing, discharging of explosives, drilling or boring procedures, or tunneling operations. A public utility owned by a public agency shall participate in and receive the services furnished by the association and shall pay their share of the costs and services furnished, but shall not be required to become a member of the association. The association, whose members or participants have underground facilities within a county, shall file with the clerk of the county a description of the geographical area served by the association and list the name and address of every member and participating public utility. [MCL 460.707(1) (internal footnote omitted and emphasis added).]

We agree with the tax tribunal that this statutory mandate does not settle the question regarding whether petitioner's activities qualify as charitable for the purpose of being exempt from ad valorem taxation. Rather, we must determine if petitioner's overall activities are charitable in nature. *Wexford*, 474 Mich at 212-213. MCL 211.7o(1) states:

Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.

"[S]tatutes exempting persons or property from taxation must be narrowly construed in favor of the taxing authority." *Liberty Hill Housing Corp v Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008). According to the Michigan Supreme Court:

Charity ... is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. [*Wexford*, 474 Mich at 214 (internal brackets, quotations, and citation omitted).]

A gift is "something given voluntarily without payment in return." *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 241; 615 NW2d 241 (2000) (quotations and citation omitted). The Michigan Supreme Court has listed six factors to consider when determining if an organization qualifies as a charitable institution:

- (1) A "charitable institution" must be a nonprofit institution.
- (2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.

(3) A “charitable institution” does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a “charitable institution” serves any person who needs the particular type of charity being offered.

(4) A “charitable institution” brings people’s minds or hearts under the influence of education or religion; relieves people’s bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.

(5) A “charitable institution” can charge for its services as long as the charges are not more than what is needed for its successful maintenance.

(6) A “charitable institution” need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a “charitable institution” regardless of how much money it devotes to charitable activities in a particular year. [*Wexford*, 474 Mich at 215.]

In reviewing the whole record, we conclude that there is competent, material, and substantial evidence to support the tribunal’s decision that petitioner’s activities do not qualify as charitable for exemption from ad valorem taxation pursuant to MCL 211.7o. According to both documentary and testimonial evidence presented to the tax tribunal, the basic purpose of petitioner, as a nonprofit corporation, is to operate a one call system to receive calls from anyone who wants to excavate in Michigan, take the excavation information from the callers, and transmit that information to the utility members and participants of the Miss Dig system. This basic purpose does not reflect an institution that is organized solely or chiefly for charity because petitioner does not relay the excavation information it receives through its one call center to the underground facilities owners free of charge. Likewise, while petitioner, through its one call center, does provide service to any person who wishes to excavate in Michigan, it does not provide a benefit to an indefinite number of people. Instead, it is only paying utility members and participants who receive the excavation information given to petitioner through its one call center, and thus, the benefit of the one call center is limited to a definite number of people.

Moreover, petitioner does not lessen the burden of a governmental agency because the Legislature, in enacting MCL 460.707(1), imposed a duty on the *public utility companies* to form a one call center. Petitioner relies upon the Code of Federal Regulations (CFR) to support its argument that the State of Michigan is required to operate a one call system and asserts that the State of Michigan fulfills this duty by requiring the public utility companies to operate the one call center. We cannot agree. While 49 CFR 198.37 does require the States who receive federal grants to operate a “one-call damage prevention program” if there is underground excavation activity, 49 CFR 198.39(a)² provides four different organizations that can be responsible for the

² 49 CFR 198.39(a) provides:

operation of the one call notification system. Regardless, petitioner does not lessen the burden of the government because it is ultimately the responsibility of the utility members and participants to mark their underground facilities before the underground excavation begins after receiving the pertinent excavation information from petitioner.³

Additionally, petitioner's financial records reveal that it usually has a surplus at the end of each fiscal year, suggesting that it charges more than what is needed for its successful maintenance. *Wexford*, 474 Mich at 215. And, finally, petitioner's overall nature is not charitable. As petitioner's own documents show, the basic purpose of petitioner's organization is to maintain an efficient one call system that centralizes and streamlines the excavation notification process between all underground facility owners within the State of Michigan before an excavation project begins. Petitioner accomplishes this directive as a nonprofit supported by the public utility members and participants. While petitioner's one call center does provide a valuable service that reduces the possibility that utilities are interrupted and protects the general public from potential injury, it does not provide its services as a gift. The tax tribunal did not misapply the law and its decision is supported by substantial evidence.

Affirmed.

No costs, a public question being involved. MCR 7.219(A).

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher

A one-call notification system qualifies to operate under this subpart if it complies with the following:

(a) It is operated by one or more of the following:

(1) A person who operates underground pipeline facilities or other underground facilities.

(2) A private contractor.

(3) A State or local government agency.

(4) A person who is otherwise eligible under State law to operate a one-call notification system.

³ We also reject petitioner's argument that by operating a one call notification system to collect and distribute excavation information to underground facility owners it somehow helps to "maintain" public works. In general, it is the organizations that operate the public works that maintain them.